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No. 92-1982

In The

Supreme Court of the United States

October Term, 1992

HILLCREST MEDICAL CENTER,

Petitioner,

v.

RONDA SCRIBNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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July 16, 1993

BEST AVAILABLE COPY

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Tort Reform Association ("ATRA") respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the accompanying brief in this Court. Counsel for the respondent has refused consent, necessitating the submission of this motion pursuant to Rule 37.2 of the Rules of this Court.

ATRA is a nonprofit association having a substantial interest in the outcome of this case. The four hundred members of ATRA include corporations, municipalities, associations, professional societies and public interest groups who have joined together to promote fairness, efficiency, balance and predictability in the civil justice system. ATRA's members are sometimes the targets of potentially ruinous punitive

damages claims, and as such have a vital interest in ensuring that this Court provide needed guidance to juries and judges who must decide whether punitive damages awards are consistent with the due process requirements of the United States Constitution.

ATRA is concerned that this Court's recent decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993), while reaffirming that the Constitution imposes due process limitations on the amount of punitive damages that may be awarded, nonetheless provided no clear standards for state and federal courts to apply when deciding whether a punitive damages award is excessive. Absent clarification by this Court, businesses and individuals will continue to be faced with ambiguous and unpredictable rulings. ATRA has a strong interest in this proceeding and can provide an important perspective on the issues presented in this case.

ATRA therefore respectfully requests that this Court grant its motion for leave to file the accompanying brief as *amicus curiae* in order to assist the Court in its consideration of the petition for certiorari.

Respectfully submitted,

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QUESTION PRESENTED

Whether the five million dollar punitive damages award in this case violates the substantive due process requirements of the United States Constitution.

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INTEREST OF AMICUS CURIAE

The American Tort Reform Association ("ATRA") is a nonprofit association representing over four hundred businesses, corporations, municipalities, associations, professional societies and public interest groups. ATRA was formed in 1986 to promote fairness, efficiency, balance and predictability in the civil justice system, particularly in the development and application of tort law. ATRA respectfully submits this brief in support of Hillcrest Medical Center's petition for writ of certiorari. ATRA has submitted *amicus* briefs to the Court in all recent cases involving the constitutionality of a punitive damages award.

This case is vitally important to ATRA and its members. ATRA believes that the rampant acceleration in the number and size of punitive damages awards is not due to some upturn in blameworthy conduct by defendants. Instead, this phenomenon is fueled by the recognition of litigants that many jurisdictions impose few if any limits on these awards. As a result, plaintiffs, in even the most trivial cases, try to "get lucky" by convincing a jury to award millions of dollars in punitive damages. Fear of such liability serves as an unhealthy and unfair brake on our country's economy. Moreover, if, as in this case, the mere negligence of an employee can serve as the basis for an award of punitive damages, then no business with employees is safe from ruin.

In this brief, ATRA demonstrates that the Court's decisions in *TXO Production Corp.* v. *Alliance Resources Corp.*, 61 U.S.L.W. 4766 (June 25, 1993), and *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), mandate the invalidation of the punitive damages award in this case.

SUMMARY OF ARGUMENT

In *Haslip* and *TXO*, this Court recognized that the due process clauses of the United States Constitution impose substantive limitations on the size of a punitive damages award. In both cases, the Court declined to establish a "bright-line"

test for determining the constitutionality of an award, favoring instead a "reasonableness" test that requires the consideration of several factors. Following *Haslip*, the lower courts were plainly confused about how to apply this test, and many observers hoped that *TXO* would produce a clear test.

That did not happen, and juries and judges are still lacking direction on this important issue. Yet in TXO, seven members of this Court reaffirmed *Haslip's* recognition that a punitive damages award can be so excessive as to violate substantive due process limitations. Because *TXO* failed to identify clearly those limits, the confusion that followed *Haslip* is likely to continue. This case will permit the Court to clear up much of the confusion. Without requiring the Court to establish a "bright-line" rule, the Court may use this case to identify a situation in which the Constitution denies the validity of a punitive damages award.

The facts of the case are simple. A hospital established a patient identification procedure. Hospital employees were negligent in following this procedure, and as a result one patient was injured. The patient's injury was minor and she recovered completely. Moreover, there was no question of real or potential gain to the hospital, no evil motive on anyone's part, and no indication that similar problems had previously occurred. There was, however, evidence that the hospital was worth a great deal of money, and the record suggests that the inflammatory and passionate words of the plaintiff's attorney caused the jury to award a constitutionally excessive sum of punitive damages.

An analysis of these facts and the factors cited in *Haslip* and *TXO* shows that the decision below surely violates the Constitution. If it does not, then *Haslip* and *TXO* have no meaning. ATRA believes that the Court meant what it said in those cases: that an award can be so excessive that it violates due process, but that no bright-line test can be created to make this determination. Instead, as in so many areas, clarity will come incrementally through the consideration by this and other courts of various factual situations. But the necessary

scrutiny will not be given to such awards unless this Court shows that it is permissible for a reviewing court to look carefully at the facts of a case, reject characterizations of those facts that defy reason, and invalidate awards that by any measure are excessive. Accordingly, the Court should grant certiorari and invalidate the decision below, for a dispassionate review of the facts demonstrates that the punitive damages award made in this case was so excessive as to violate substantive due process limitations.

ARGUMENT

I. *HASLIP* AND *TXO* FAILED TO PROVIDE SUFFICIENT GUIDANCE CONCERNING THE DUE PROCESS LIMITATIONS ON AN AWARD OF PUNITIVE DAMAGES

The Court's recent decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993), and its earlier decision in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), established that the United States Constitution provides substantive due process limits on the discretion of juries and judges to award punitive damages. At some point, the amount of an award is too great, and in some situations punitive damages will be wholly improper. But the question lingers, especially after *TXO:* what are the limits? The Court seems united in the view that no "bright-line" test can be created to apply in every case. *TXO*, 61 U.S.L.W. at 4770. This may be true, but surely this Court can, through the consideration of specific factual circumstances, begin to define in a more precise manner those situations where a punitive damages award is constitutionally excessive. ATRA believes that the facts in this case will permit the Court to clear up much of the uncertainty that still permeates this important area of the law.

As the petitioner and the supporting *amici* demonstrated conclusively in their briefs to this Court in *TXO*, the constitutional limitations on the size of punitive damages awards were

poorly understood prior to the decision in *TXO*. In *Haslip*, the Court recognized that due process imposes both procedural and substantive limits on an award of punitive damages. 111 S.Ct. at 1043. With respect to the determination of excessiveness, the Court discussed with approval the substantive standards applied by Alabama courts in reviewing punitive damages awards. *Id.* at 1044-45. But after *Haslip*, state and federal courts reacted with confusion,[1] making it plain that further guidance was needed. Unfortunately, *TXO* failed to provide it, and there is little doubt that the confusion persists.

Justice Stevens' plurality decision in *TXO* reaffirmed that there are substantive due process limits on the size of a punitive damages award. The plurality, however, declined to establish an easily-applied rule for determining excessiveness, and instead merely repeated the standard enunciated in *Haslip* that " '[a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.' " 61 U.S.L.W. at 4770, quoting *Haslip*, 111 S. Ct. at 1043.

Several justices in *TXO* shared ATRA's concern that the plurality decision provides no guidance to juries and courts that must apply this ruling. Justice Kennedy, in a concurring opinion, stated that even after the Court's decision "we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it." 61 U.S.L.W. at 4772. Justices O'Connor and White, in a dissenting opinion, noted that the "plurality opinion erects not a single guidepost to help other courts find their way through this area." *Id.* at 4776. Justice Kennedy also pointed out that the "reasonableness" test articulated in *TXO* will provide a reviewing court

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[1] *See, e.g., Amicus Curiae* Brief of Product Liability Advisory Council, Inc. in Support of Petitioner, TXO Production Corp. v. Alliance Resources Corp., 61 U.S.L.W. 4766 (U.S. June 25, 1993); Brief *Amici Curiae* of Phillips Petroleum Co., United Services Automobile Association, and Allstate Insurance Co. in Support of Petitioner, TXO Production Corp. v. Alliance Resources Corp., 61 U.S.L.W. 4766 (U.S. June 25, 1993).

with "nothing more than its own subjective reaction to a particular punitive damage award in deciding whether the award violates the Constitution." *Id.* at 4772.

These concerns are plainly justified, but the problem is not insoluble. The Court can clarify this confused situation by seeking out a case that will permit it to do what it has not done before: invalidate a plainly unconstitutional award of punitive damages. When evaluated under the standards of *Haslip*, *Hillcrest Medical* presents the Court with a clear case of a constitutionally impermissible punitive damages award. By granting the petition for writ of certiorari, the Court can provide content to the reasonableness standard which was recognized in both *Haslip* and *TXO* as the test for determining whether a punitive damages award is constitutionally excessive.

II. THE PETITIONER'S CONDUCT CANNOT SUPPORT THE GROSSLY EXCESSIVE PUNITIVE DAMAGES AWARDED TO THE RESPONDENT

The *Hillcrest Medical* case differs significantly from *Haslip* and *TXO*. Both *Haslip* and *TXO* involved instances of intentional fraud or a pattern and practice of malicious behavior. *TXO*, 61 U.S.L.W. at 4773 (Kennedy, J., concurring); *Haslip*, 111 S.Ct. at 1041. In *Hillcrest Medical*, however, the petitioner's conduct was neither malicious nor intentional. At best, the evidence demonstrates that the hospital was merely negligent.

The basic facts are simple. A hospital orderly mistakenly moved a patient who was recovering from a hysterectomy from her bed to undergo an ultrasound test. The error was discovered while preparing the patient for the test and she was returned to her room. Her sutures later ruptured and she contended, and the jury apparently believed, that this was caused by her being mistakenly moved from her bed. Further surgery repaired the problem, with no lasting ill effects. On these facts a jury awarded her $100,000 in actual damages—

$97,000 of that was for pain and suffering—and ten million dollars in punitives, reduced by the Oklahoma Court of Appeals to five million dollars.

Hillcrest and ATRA contend that under no circumstances can this award be justified. It is shocking and plainly runs afoul of the constitutional limitations recognized in *TXO* and *Haslip*. While perhaps the orderly's arguably "reckless" conduct can be imputed to the hospital for purposes of determining compensatory damages, that conduct cannot, consistent with due process requirements, support an excessive award of punitive damages against an employer that, at best, was negligent. In *Haslip*, this Court upheld a punitive damages award under the respondeat superior doctrine because the defendant insurance company was aware of its agent's fraudulent behavior. 111 S.Ct. at 1041. In *TXO*, this Court noted that the corporation engaged in bad faith behavior and that there was a "pattern of fraud, trickery and deceit" on the part of its executive staff. 61 U.S.L.W. at 4771-72. In stark contrast, the award in *Hillcrest Medical* rests on the isolated "reckless" act of an orderly. There is no evidence that the hospital itself was anything more than negligent. This calls to mind Justice Kennedy's observation in his concurring opinion in *TXO* that "[a] case involving vicarious liability, negligence, or strict liability might present different issues" than the one presented in *TXO*, in which the defendant corporation engaged in fraudulent and deceitful conduct. 61 U.S.L.W. at 4773.

A comparison with *TXO* is instructive. Unlike the situation in *TXO*, this case presents no issue of "potential harm" to obfuscate the Court's consideration of the reasonableness of the punitive damage award. Clearly the hospital had nothing to gain by its employee's conduct. Performing improper tests on patients merely imposes costs on the hospital and risks potentially ruinous lawsuits. Nor can the hospital's actions be characterized in any way as fraudulent or malicious. The facts

clearly suggest that the hospital orderly simply made a mistake, albeit one that in light of the patient's protests should have been detected earlier.

What then could justify the excessive award made in the *Hillcrest* case? It is apparent that this is simply a case involving redistribution of wealth by a jury inflamed by a lawyer's passionate rhetoric. The evidence showed that the hospital had a net worth of $107 million. To understand precisely what happened in this case one need only review some of the comments made to the jury by the plaintiff's counsel:

> "Let me tell you something about punitive damages. A rich man won't pay his fines. . . . He'll accumulate his parking fines and violations and once every six months he'll send a hired girl or somebody on the payroll down to pay it. He doesn't go down there. . . . He's not intimidated by these small fines and parking fines, not the rich man, he's not. But we are. We have to pay our fines. . . . If you're going to make a rich man hear you you've got to to [sic] enough in money damages toward him that he hears you irrevocably. . . ."

TR. 685, 691.

> "I haven't seen the CEO of Hillcrest here, Chief Executive Officer. I haven't seen any members of the Board of Directors. I see a lady over there that's a hired hand that they sent down here to take their whipping for them. They're not here. . . . Do you know why they're not here? Because this isn't important to them. . . . They don't think that you citizens off the public street have enough gumption, enough common sense, enough character and enough guts to do something to get their attention.
>
> "Well, if you want to talk to the Board of Hillcrest up there and you want to send them a message they'll hear, then you have to find substantial damages in punitive damages in this case. . . . We're not animals in a veterinary clinic, we're people. . . .
>
> "These people drag in a $160,000,000 a year and they don't love us. . . . What is the matter with these people? And they are so oblivious out there to you they

> don't fear you, they don't respect you, they're not even here."

TR. 685-86, 690-91.

Plainly, a skillful lawyer convinced a jury to punish a defendant for being wealthy. In awarding or reviewing an award of punitive damages, the defendant's wealth may be a factor to be considered, but it should not be the only factor. Indeed, wealth is but one of seven factors which this Court in *Haslip* recognized as appropriate to consider when reviewing the constitutionality of a punitive damage award.[2]

Consideration of this award in light of the factors cited with approval by the Court in *Haslip* demonstrates the unreasonableness of the amount of punitive damages awarded below. The first *Haslip* factor is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from defendant's conduct as well as the harm that actually occurred. 111 S.Ct. at 1045. Surely in this case there was no reasonable relationship between the amount of punitive damages awarded and the harm that actually occurred. The plaintiff suffered actual out-of-pocket damages of about $3,000, yet was awarded approximately 1,840 times that amount in punitive damages. And it is unlikely that the potential harm could have been any worse than what was experienced by this plaintiff. As noted above, there simply was no evidence that the hospital regularly failed to follow its procedures. This was a one-time occurrence.

The second *Haslip* factor focuses on the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct. *Id.* This factor plainly militates for the award of no punitive damages in this case. The defendant here was negligent at best. The

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[2] *See* 111 S. Ct. at 1045. These factors are repeated in the Petition for Certiorari at page 22.

conduct was a one-time occurrence, and there was no indication of any concealment.

The third *Haslip* factor, the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a loss, *id.*, was discussed above. There was and could have been no profit derived by the hospital in this case.

The fourth *Haslip* factor, the financial position of the defendant, *id.*, is seemingly the only factor applied in this case. Yet, to apply that factor alone, when nothing else suggests an award of punitive damages is appropriate, surely cannot be constitutional.

Fifth, *Haslip* suggested that the costs of litigation should be considered. *Id.* There is nothing in the record to indicate that costs were large. Indeed, the respondent probably bore no costs.

The sixth *Haslip* factor is whether criminal sanctions might be imposed, and if so such factors are to be taken in mitigation. *Id.* Here, it is unlikely that any criminal penalties could have been imposed for the conduct of the hospital.

Seventh, and finally, the existence of other civil awards against the defendant for the same conduct may be considered as a mitigating factor. *Id.* Again this factor seems to have no applicability to this one-time occurrence.

The substantive *Haslip* factors clearly mandate the invalidation of the award here. The Court of Appeals of Oklahoma, in reviewing the trial court's ruling, purported to engage in the type of procedural review called for in *Haslip*, and yet still upheld this award. *See* slip op., reprinted in Hillcrest's Petition for Certiorari, at pp. 11a-14a. But the facts suggest that this review was cursory and halfhearted.[3]

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[3] In light of the fact that the court below has already purported to consider the award in light of *Haslip*, ATRA strongly believes that the Court should grant the petition for writ of certiorari. However, the Court should, at minimum, remand the case to the Court of Appeals of Oklahoma for further proceedings in light of *Haslip* and *TXO*.

Much more could be said, but it is plain that in allowing this award to stand the Court would sanction a miscarriage of justice. Seven members of this Court in *TXO* indicated that there are constitutional limitations on the size of a punitive damages award. Perhaps a bright-line test cannot be drawn, but more precise instructions can be given to the lower courts in an incremental fashion by highlighting those cases in which a punitives award is so excessive as to violate due process. This is such a case.

CONCLUSION

For the reasons stated above, the American Tort Reform Association respectfully urges this Court to grant Hillcrest Medical Center's petition for writ of certiorari.

Respectfully submitted,

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